Office-Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-836

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

BRIEF ON THE MERITS

JOHN K. VAN DE KAMP
Attorney General of
the State of California

WILLIAM GEORGE PRAHL
Supervising Deputy
Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5262

Attorneys for Petitioner

91 pp

QUESTIONS PRESENTED

1. Was it error for the District Court to apply a rule of *Per Se* reversible error to a case of discriminatory grand jury selection where there is overwhelming evidence of the defendant's guilt and where the defendant received a full and fair trial?

2. Did respondent fail to exhaust his available state remedies by significantly changing the evidentiary basis of his claim for relief without ever presenting this new evidence to the state courts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
STATEMENT OF PERTINENT FACTS	20
A. Facts of the Offense	20
B. Facts Produced at Respondent's Original State Court Motion to Quash the Indictment	35
C. Facts Produced at the Federal Evidentiary Hearing	41
ARGUMENTS	
I INTRODUCTION	45
II IT WAS ERROR FOR THE DISTRICT COURT TO APPLY A RULE OF AUTOMATIC REVERSAL TO A CASE OF PURPOSEFUL DISCRIMINATION WHERE THERE IS OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT; WHERE THE DEFENDANT RECEIVED A FULL AND FAIR TRIAL; AND WHERE THERE IS NO INDICATION OF CONTINUING DISCRIMINATION	52

		Pages
III	RESPONDENT FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES SINCE HE SIGNIFICANTLY CHANGED THE EVIDENTIARY BASIS OF HIS CLAIM FOR RELIEF WITHOUT EVER PRESENTING THIS NEW EVIDENCE TO STATE COURTS	68
CONCLUSION		81

TABLE OF AUTHORITIES

	Pages
Alexander v. Louisiana (1972) 405 U.S. 625	52
Bush v. Kentucky 107 U.S. 110	53
Camera v. Bombard (S.D.N.Y. 1978) 455 F.Supp. 176	70
Cassell v. Texas (1950) 339 U.S. 282	53,56,63
Castaneda v. Partida (1976) 430 U.S. 482	48
Chapman v. California (1967) 386 U.S. 18	53,58,59
Connecticut v. Johnson (1983) ___ U.S. ___	58
Daniels v. Nelson (9th Cir. 1972) 453 F.2d 340	78
Gibson v. Mississippi 162 U.S. 565-53,	53
Gideon v. Wainwright (1963) 372 U.S. 335	59
Gurule v. Turner (10th Cir. 1972) 461 F.2d 1083	76,81
Hale v. Kentucky 303 U.S. 613-53,	53

	Pages
Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189	17,69
Hillery v. Pulley (E.D. Cal. 1983) 563 F.Supp. 1228	19
Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632	12
Hobby v. United States (1984) ___ U.S. ___	60,64,67
In re Hillery (1969) 71 Cal.2d 857	5
Knoxson v. Estelle (5th Cir. 1978) 574 F.2d 1339	76
La Blanc v. Patterson (D.C. Colo. 1968) 294 F.Supp. 607	70
Neal v. Delaware 103 U.S. 370-53,	53
Nelson v. Moore (2nd Cir. 1972) 470 F.2d 1192	72
Paullett v. Howard (3rd Cir. 1980) 634 F.2d 117	78
Payne v. Arkansas (1958) 356 U.S. 560	59

	Pages
People v. Anderson (1972) 6 Cal.3d 628	21
People v. Hillery (1965) 62 Cal.2d 692	5,20,38
People v. Hillery (1967) 62 Cal.2d 795	5
People v. Hillery (1974) 10 Cal.3d 897	5,21
Rose v. Mitchell (1979) 443 U.S. 545	54,passim
Schiers v. People of the State of California (9th Cir. 1964) 333 F.2d 173	79
Stone v. Powell (1976) 428 U.S. 465	62
Strader v. West Virginia (1880) 100 U.S. 303	53
Sumner v. Mata (1981) 449 U.S. 539	36,47,49
Tumey v. Ohio (1927) 273 U.S. 510	59-60
United States ex rel. Barksdale v. Blackburn (5th Cir. 1981) 635 F.2d 1115	20,58,63
U.S. ex rel. Figueroa v. McMann (2nd Cir. 1969) 411 F.2d 915	70

	Pages
U.S. ex rel. Galloway v. Fogg (D.C.N.Y. 1975) 403 F.Supp. 248	70
Zicarelli v. Dietz (3rd Cir. 1980) 633 F.2d 312	75,76
Zicarelli v. Gray (3rd Cir. 1976) 543 F.2d 466	75,76

STATUTES, CODES AND OTHER AUTHORITIES

California Code of Civil Procedure	
§ 198	39
§ 200	40
§ 206	38
California Penal Code	
§ 187	3,45
§ 893	39,40
§ 897	39
§ 899	38
§ 995	35
§ 1239(b)	5
28 United States Code	
§ 1254(1)	2
§ 1292(b)	18
§ 2254	10,passim
§ 2254(b)	70

	Pages
United States Constitution	
Amendment Four	61
Amendment Five	3
Amendment Fourteen	3,55
20 U.C.L.A. Law Review 581 (1973)	40
Friendly, Is Innocence Irrelevant? Collateral Attach on Criminal Judgments, 38 U.Chi.L.Rev. 142	20

No. 84-836

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

DANIEL VASQUEZ, the Warden of
San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

BRIEF ON THE MERITS

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeal affirming an order of the United States District Court for the Eastern District of California were filed on May 14, 1984. These

opinions are reproduced as Appendix "A" to the petition for a writ of certiorari filed in this Court. A timely petition for rehearing and a suggestion for rehearing en banc was thereafter field in the Ninth Circuit Court of Appeal. That court filed an order denying rehearing on September 12, 1984. The opinion is denying rehearing reproduced as Appendix "B" to the petition for a writ of certiorari.

JURISDICTION

Petitioner asserts jurisdiction under 28 United States Code section 1254(1).

- - - - - -

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution,

Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The Grand Jury of Kings County returned an indictment on June 27, 1962, charging respondent Booker T. Hillery with a violation of California Penal Code section 187 in that on or about the 21st of March, 1962, respondent did willfully, unlawfully,

and feloniously murder Marlene Miller (CT 1). [1]

On July 16, 1962, respondent, through his attorney, made a motion to quash the indictment. The motion alleged that members of respondent's race had been systematically and purposely excluded from the Grand Jury which indicted him (CT 26, 28).

Respondent's motion was heard, considered, and denied on July 31, 1962 (CT 41).

On November 16, 1962, the jury returned a verdict of guilty as to the charged offense and fixed the degree at first degree murder (CT 75). On November 20, 1962,

---

1. Hereafter "CT" refers to the Clerk's Transcript prepared in connection with the appeal of respondent's first state court trial; "RT" refers to the Reporter's Transcript prepared in connection with the appeal of respondent's first state court trial; "CR" refers to the Clerk's Record for the Ninth Circuit appeal in this case.

the jury returned a verdict fixing respondent's penalty at death (CT 132).

On November 26, 1962, the court imposed a judgment of death (CT 145).

An automatic appeal to the California Supreme Court followed pursuant to section 1239(b) of the Penal Code.

On May 3, 1965, the California Supreme Court filed an opinion affirming the guilt phase of respondent's trial but reversed imposition of the death penalty. (People v. Hillery (1965) 62 Cal.2d 692.)

Respondent was to be subsequently given two additional penalty trials with each resulting in imposition of a death sentence. (See People v. Hillery (1967) 62 Cal.2d 795, cert. en., 87 S.Ct. 958 (1967); In re Hillery (1969) 71 Cal.2d 857; People v. Hillery (1974) 10 Cal.3d 897.)

In January of 1978, respondent filed a habeas corpus petition in the Marin

County Superior Court alleging that blacks had been excluded from the grand jury which indicted him (CR 1). Respondent relied upon the record of his original motion to quash to support his claim of purposeful discrimination.

In March of 1978, respondent filed a petition for writ of habeas corpus in California's First District Court of Appeal and in April of 1978 respondent filed a petition for a writ of habeas corpus in the California Supreme Court (CR 1). On each occasion, respondent did not offer any new evidence and instead relied on the record of his original trial.

The instant petition was originally filed in the United States District Court for the Northern District of California on May 22, 1978. In the original petition, respondent again relied exclusively upon the

state court record and did not seek an evidentiary hearing in federal court.

The case was then transferred to the Eastern District on October 31, 1978.

On January 31, 1979, the District Court, per Judge MacBride, issued an order to show cause. The court's order granted respondent permission to proceed in forma pauperis. The court found that respondent's allegations were sufficient to state a prima facie case of systematic exclusion (CR 2).

The term "prima facie" has been used in two contexts in the instant case. In its first context, this term refers to the sufficiency of the allegations of the petition for a writ of habeas corpus and the court's decision as to whether to issue an order to show cause. Used in this context, the test is whether the petitioner's allegations and the evidence offered in support thereof warrant issuing an order to

show cause. An order to show cause will be issued where petitioner has made a prima facie showing in support of his claim for relief.

Secondly, the term "prima facie case" has a more specialized meaning within the body of jury discrimination law. Here, "prima facie case" refers to the ability of the party claiming systematic exclusion to meet his burden of proof by showing that there has been such exclusion. Such a showing operates to shift the burden of proof of the state to explain why there has been systematic exclusion. If the state is unable to rebut the prima facie case, the writ should be granted if the trial court, upon reviewing all of the evidence, feels that petitioner has established systematic exclusion.

The State's return to the order to show cause was filed on March 22, 1979 (CR 4).

In the return, petitioner acknowledged that respondent had exhausted his state remedies as to the claims presented in the petition but denied that respondent was entitled to relief.

On April 23, 1979, respondent Hillery filed a traverse to the return to the order to show cause. In his traverse, respondent requested an evidentiary hearing (CR 5).

On September 13, 1979, Volume I of the reporter's transcript and Volume I of the clerk's transcript from respondent Hillery's direct appeal to the California Supreme Court were lodged with the District Court by petitioner.

On March 27, 1980, the district court, per Judge Karlton, issued an order updating the status of the case. This order vacated the portion of the original order to show cause which held that respondent's

allegations were sufficient to establish a prima facie case of discrimination. In the order, the parties were directed to supplement and clarify the state court record which the district court found to be "silent or unclear as to a number of relevant issues." (CR 8, p. 2.) In ordering enlargement of the record, the district court held that rule 7(a), 28 United States Code, following section 2254, permits expansion of the state court record to supplement and clarify that record (CR 8).

The order found that the state court record was silent as to which portion of the black population in Kings County was eligible for grand jury service and held that it was the State's responsibility to reduce general population statistics into "more refined figures." The district court's order also indicated that the record was silent on the application of "statistical probability

theory" to the historical facts of the case. The district court indicated in its order that such an analysis was relevant under the case law and "may" be of substantial assistance to the court.

The order directed a status conference to be held on May 27, 1980, with each party's status conference report being due not later than three days prior to the conference.

Finally, the district court's March 27, 1980, order also denied respondent Hillery's application for bail and appointed counsel to represent him (CR 8).

On May 21, 1980, respondent filed his status conference report; petitioner's report was filed on May 23, 1980. A status conference was conducted on May 27, 1980 (CR 12-13).

Respondent's answers to the Court's interrogatories were filed on June 19, 1980 (CR 18).

Petitioner filed partial answers to the Court's interrogatories on June 19, 1980, and that same day petitioner filed a motion to dismiss the petition; a motion for reconsideration of the order of March 27, 1980; and a request for a stay in responding to the remainder of the Court's interrogatories (CR 16-17).

On June 25, 1980, respondent filed supplemental answers to the Court's interrogatories (CR 19).

On August 7, 1980, the district court issued a published order denying petitioner's motions (CR 21). (Hillery v. Sumner (E.D. Cal. 1980) 496 F.Supp. 632.)

Petitioner's answers to the Court's interrogatories were filed on August 27, 1980 (CR 22).

On December 8, 1980, the district court issued an order setting the matter for a status conference on February 11, 1981.

Each party filed timely status conference reports prior to the conference date (CR 23-24).

On March 4, 1981, the district court issued a status conference order. The court set the matter for a two-day evidentiary hearing on September 1, 1981, on the issue of whether respondent could establish a prima facie case of discrimination. A prehearing conference was set for August 3, 1981. Discovery was left open except that it was to be completed prior to the prehearing date (CR 25).

On April 8, 1981, respondent filed and served his first set of interrogatories on petitioner (CR 26).

On May 19, 1981, the State filed and served its first set of interrogatories on respondent (CR 28).

On July 17, 1981, the court issued an order vacating both the prehearing conference date and the hearing date (CR 29).

The court set the matter for a further status conference on September 28, 1981 (CR 29).

At the status conference conducted on September 28, 1981, the State stipulated that if Hillery's new evidence was determined to be admissible, it would be sufficient to state a prima facie allegation which would warrant issuing an order to show cause on his systematic exclusion claim. At the conference, respondent indicated that he was willing to submit the case to the district court on the basis of documents and affidavits and without live testimony. Although petitioner argued that an

evidentiary hearing was unnecessary, it was also argued in the alternative that if new evidence was to be received by the Court, the State was entitled to a full evidentiary hearing (CR 31).

In its order of September 29, 1981, which followed the status conference, the district court directed respondent to prepare a proposed stipulation which was to have attached to it all of the documents which would support respondent's claim of systematic exclusion. The stipulation was to include those matters which petitioner agreed could be submitted to the district court on documents alone (CR 31).

Within fourteen days, petitioner was to file a response on the question of why an evidentiary hearing was necessary as to any matters which were not covered by the stipulation.

The stipulation was filed on or about October 14, 1981. In that stipulation, the parties agreed:

1) that respondent had evidence which was attached to the stipulation which demonstrated a prima facie case sufficient to warrant issuance of an order to show cause;

2) that an evidentiary hearing was required to establish the facts of respondent's case wherein petitioner would have the opportunity to cross-examine respondent's witnesses; and

3) that by agreeing to the above two items, the State was not waiving any objections they had to the admissibility of any "new evidence offered by

Mr. Hillery in support of his claim for relief" (CR 32).

On November 10, 1981, the State filed a notice of motions and motions for dismissal of petition for failure to exhaust as to the newly discovered and recently produced evidence and for summary denial of the petition (CR 36).

Respondent filed his opposition to the motion on or about November 30, 1981 (CR 37).

Petitioner filed a reply brief on December 7, 1981 (CR 38).

On March 9, 1982, the district court filed a published opinion denying the State's motion. The court held, inter alia, the respondent's allegations were sufficient to support a prima facie case and preclude the summary dismissal of the petition (CR 39). (Hillery v. Pulley (E.D. Cal. 1982) 533 F.Supp. 1189.)

Petitioner's answer was filed on March 24, 1982 (CR 40).

On March 30, 1982, petitioner filed a notice of motion and motion for an order permitting an interlocutory appeal under 28 United States Code section 1292(b) (CR 41). This motion was denied on April 19, 1982 (CR 43a).

The court further ordered that an evidentiary hearing be conducted on April 28, 1982.

The evidentiary hearing was conducted on April 28 and 29, 1982. Submission of the case was deferred to allow depositions to be taken of several elderly witnesses who resided in Kings County (CR 51, 52).

On June 3, 1982, petitioner filed closing arguments (CR 53).

On May 12, 1983, the district court issued its published 54-page opinion granting

the petition for a writ of habeas corpus (CR 56). (Hillery v. Pulley (E.D. Cal. 1982) 563 F.Supp. 1228.)

The State filed timely notice of appeal on May 25, 1983 (CR 58).

STATEMENT OF PERTINENT FACTS

A. Facts of the Offense

Although the district court held that the facts of the offense were irrelevant to respondent's contention regarding the selection of the 1962 Kings County Grand Jury, there is case law and commentary which suggest that a federal habeas corpus petitioner's guilt may not be a totally irrelevant consideration. [2/]

A detailed factual account of the offense may be found in the 1965 opinion of the California Supreme Court in People v. Hillery (1965) 62 Cal.2d 692 which affirmed the guilt phase of respondent's state court murder conviction but which reversed his first death penalty sentence.

---

1. See Friendly, Is Innocence Irrelevant? Collateral Attach on Criminal Judgments, 38 U.Chi.L.Rev. 142, 170; United States ex rel. Barksdale v. Blackburn (5th Cir. en banc, 1981) 635 F.2d 1115.)

The guilt phase of respondent's trial was not reviewed again on direct appeal but two subsequent death penalty judgments were overturned and respondent's third death sentence was finally commuted to life imprisonment by virtue of the California Supreme Court's decision in People v. Anderson (1972) 6 Cal.3d 628.

A review of these facts makes it difficult to entertain any reasonable doubt that respondent brutally murdered fifteen-year-old Marlene Miller soon after he had been released on parole from an earlier forcible rape conviction. Three separate juries have arrived at this conclusion, including one in Kern County, where the matter was tried in 1972, because of a change of venue. (See People v. Hillery, supra, 10 Cal.3d 897.)

Respondent Hillery entered a plea of not guilty to an indictment charging him

with the murder of Marlene Miller on March 21, 1962. The victim, a fifteen-year-old girl, lived with her parents and brother in a rural area of California's Central Valley, some five miles from Hanford, which is in Kings County, California. On the evening of the crime, Marlene's brother was at work and her parents left at 6:15 p.m. to attend night classes. Marlene remained at home alone to do some sewing. The lights were on, the window shades were up, and the doors were unlocked. At approximately 8:30 p.m., Bev Honegger telephoned the Miller home and conversed briefly with Marlene. When Mr. and Mrs. Miller returned at 9:55 p.m. they found Marlene missing. The television set was playing loudly, the sewing machine light was on, an ironing board was set up, and the iron was hot. In the master bedroom a sleeping bag that was normally stored on a cedar chest was on the floor, as were a coat

and a blanket. A window in the exterior wall of Marlene's room was raised, and the window screen had been removed and was lying outside on the grass.

The police arrived five or ten minutes later in response to Mr. Miller's call and undertook an examination of the entire area. A mashed leaf was found on a trellis near the open window of Marlene's bedroom; and a glove handprint was detected on the top of the television set in front of that window, showing the hand intruding toward the interior of the house. There were scuff marks on the ground outside, which appeared to have been made by the side of a shoe being dragged over the earth. A trail of blood spots led to the bank of a nearby irrigation ditch. Partial footprints were found, and prints of a small tennis shoe.

Marlene's body was discovered the following morning, submerged in an irrigation

ditch some 75 to 100 yards west of the Miller home. Evidencing a source of the trail of blood spots, a pair of large sewing shears bearing the name "Marlene M." was embedded up to the handles in the young girl's chest. The pointed blades had been thrust downward into the body at a point immediately above the sternal notch, puncturing a lung and causing death by massive hemorrhaging and shock. The points of the scissors were lodged in the posterior wall of the chest cavity. A towel and a half-slip were found knotted around her neck. Her wrists were securely tied behind her back with a piece of cord similar to that on the Miller sleeping bag, which had apparently been cut. On one foot she wore a tennis shoe; the other foot was bare. Her blouse was pulled down around her shoulders, pinning her arms to her body. Her brassiere was pulled upwards, exposing her breasts. Her jeans were ripped open down

the back and through the crotch. There were several stab marks on the body where attempts were made to rip the jeans before the final rip was made down the seam. Her underpants were torn, exposing her private parts. Her legs were drawn up and her knees were spread apart. There were bruises on her chin, back, and knees. Marlene was dead, but apparently she had won part of her battle; the external genitalia showed no bruises or other trauma and the hymen was intact.

The Miller home is situated on the corner of Elder Avenue and Tenth Avenue, and there is a stop sign on Elder at this intersection. Approximately two-tenths of a mile to the east on Elder is a dirt road known as Tome Lane. One-half mile to the west of the Miller home on Elder is the Ferreira ranch, where respondent Hillery was employed on the date of the murder, March 21, 1962 (and had been so employed since

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

the petition for a writ of habeas corpus (CR 56). (Hillery v. Pulley (E.D. Cal. 1982) 563 F.Supp. 1228.)

The State filed timely notice of appeal on May 25, 1983 (CR 58).

STATEMENT OF PERTINENT FACTS

A. Facts of the Offense

Although the district court held that the facts of the offense were irrelevant to respondent's contention regarding the selection of the 1962 Kings County Grand Jury, there is case law and commentary which suggest that a federal habeas corpus petitioner's guilt may not be a totally irrelevant consideration. [2]

A detailed factual account of the offense may be found in the 1965 opinion of the California Supreme Court in People v. Hillery (1965) 62 Cal.2d 692 which affirmed the guilt phase of respondent's state court murder conviction but which reversed his first death penalty sentence.

---

1. See Friendly, Is Innocence Irrelevant? Collateral Attach on Criminal Judgments, 38 U.Chi.L.Rev. 142, 170; United States ex rel. Barksdale v. Blackburn (5th Cir. en banc, 1981) 635 F.2d 1115.)

The guilt phase of respondent's trial was not reviewed again on direct appeal but two subsequent death penalty judgments were overturned and respondent's third death sentence was finally commuted to life imprisonment by virtue of the California Supreme Court's decision in People v. Anderson (1972) 6 Cal.3d 628.

A review of these facts makes it difficult to entertain any reasonable doubt that respondent brutally murdered fifteen-year-old Marlene Miller soon after he had been released on parole from an earlier forcible rape conviction. Three separate juries have arrived at this conclusion, including one in Kern County, where the matter was tried in 1972, because of a change of venue. (See People v. Hillery, supra, 10 Cal.3d 897.)

Respondent Hillery entered a plea of not guilty to an indictment charging him

with the murder of Marlene Miller on March 21, 1962. The victim, a fifteen-year-old girl, lived with her parents and brother in a rural area of California's Central Valley, some five miles from Hanford, which is in Kings County, California. On the evening of the crime, Marlene's brother was at work and her parents left at 6:15 p.m. to attend night classes. Marlene remained at home alone to do some sewing. The lights were on, the window shades were up, and the doors were unlocked. At approximately 8:30 p.m., Bev Honegger telephoned the Miller home and conversed briefly with Marlene. When Mr. and Mrs. Miller returned at 9:55 p.m. they found Marlene missing. The television set was playing loudly, the sewing machine light was on, an ironing board was set up, and the iron was hot. In the master bedroom a sleeping bag that was normally stored on a cedar chest was on the floor, as were a coat

and a blanket. A window in the exterior wall of Marlene's room was raised, and the window screen had been removed and was lying outside on the grass.

The police arrived five or ten minutes later in response to Mr. Miller's call and undertook an examination of the entire area. A mashed leaf was found on a trellis near the open window of Marlene's bedroom; and a glove handprint was detected on the top of the television set in front of that window, showing the hand intruding toward the interior of the house. There were scuff marks on the ground outside, which appeared to have been made by the side of a shoe being dragged over the earth. A trail of blood spots led to the bank of a nearby irrigation ditch. Partial footprints were found, and prints of a small tennis shoe.

Marlene's body was discovered the following morning, submerged in an irrigation

ditch some 75 to 100 yards west of the Miller home. Evidencing a source of the trail of blood spots, a pair of large sewing shears bearing the name "Marlene M." was embedded up to the handles in the young girl's chest. The pointed blades had been thrust downward into the body at a point immediately above the sternal notch, puncturing a lung and causing death by massive hemorrhaging and shock. The points of the scissors were lodged in the posterior wall of the chest cavity. A towel and a half-slip were found knotted around her neck. Her wrists were securely tied behind her back with a piece of cord similar to that on the Miller sleeping bag, which had apparently been cut. On one foot she wore a tennis shoe; the other foot was bare. Her blouse was pulled down around her shoulders, pinning her arms to her body. Her brassiere was pulled upwards, exposing her breasts. Her jeans were ripped open down

the back and through the crotch. There were several stab marks on the body where attempts were made to rip the jeans before the final rip was made down the seam. Her underpants were torn, exposing her private parts. Her legs were drawn up and her knees were spread apart. There were bruises on her chin, back, and knees. Marlene was dead, but apparently she had won part of her battle; the external genitalia showed no bruises or other trauma and the hymen was intact.

The Miller home is situated on the corner of Elder Avenue and Tenth Avenue, and there is a stop sign on Elder at this intersection. Approximately two-tenths of a mile to the east on Elder is a dirt road known as Tome Lane. One-half mile to the west of the Miller home on Elder is the Ferreira ranch, where respondent Hillery was employed on the date of the murder, March 21, 1962 (and had been so employed since

June 1961). Marlene had worked as a babysitter for the Ferreira family on a number of occasions during the spring of 1962, one of which was shortly before March 21.

At 8:45 p.m. on the day of the crime, a high school student noticed respondent's automobile, 1952 Plymouth with an unusual paint combination, parked on Tome Lane just off Elder. A second witness saw respondent's car in that location at about the same time. Tire marks were found in the lane after the murder; they were photographed, and ink impressions were made of the tires on respondent's car. Expert testimony established that the marks in the lane had been made by the tires on respondent's car.

A right and a left bootprint were found in Tome Lane near the tire marks. The position of the prints indicated that the

wearer had been walking in the direction of the Miller home. Expert testimony established that the prints were made by respondent Hillery's boots. There were also stockinged footprints nearby, leading back towards the place where the car was parked.

A pair of mismatched black gloves were found in the weeds "at the edge of the road" along Elder Avenue, to the east of Tome Lane. When found, they were soaking wet. The gloves were traced to respondent Hillery by the following evidence:

The right-hand glove 'People's Exhibit 34) was black with a red orlon lining, and was similar in appearance and size to a pair sold to respondent sometime before Christmas 1961 by Correll Hicks. Respondent paid for the gloves in the presence of Allean Stallworth, respondent's girlfriend. The latter corroborated Hick's testimony, and stated that Hillery later

showed her the gloves and said they were the pair he had bought from Hicks. She further testified that she knew of no other gloves with a red lining owned by Hillery; that about a week before March 21, 1962, respondent told her that he had lost one of a pair of gloves; and that the remaining glove, which he showed her, looked like People's Exhibit 34.

The left-hand glove found on Elder Avenue (People's Exhibit 33), a leather outer glove suitable for wearing over a lining, was identified as similar in appearance to those sold by an army surplus store in Hanford. The manager of that store testified that respondent Hillery had been a customer of his; that on January 22, 1962, he wrote out a sales slip in the amount of $1.29 plus tax; and that gloves similar to People's Exhibit 33 were on sale at that time in his store for $1.29 a pair. The sales slip (People's

Exhibit 67) was found in the back seat of respondent's car after his arrest.

Respondent's employer, Joe Ferreira, testified that some two weeks prior to March 21, Hillery complained of losing a glove; that the remaining one, which respondent showed him, was similar to Exhibit 34; and that respondent thereafter wore the latter in a mismatched pair with a glove similar to Exhibit 33.

A narrow brown belt (People's Exhibit 35) was also found in the weeds on Elder, near the gloves. By contrast with the latter, the belt was not wet. Mr. Ferreira testified that the belt looked just like one used by respondent to hold up hip boots that he wore at work. Among other identifying points of similarity, the belt bore two marks where the hip boots were supported. There was expert testimony that the marks could

have been caused by heavy objects such as respondent's hip boots.

Respondent Hillery was arrested in his car on the morning of March 22, 1962, in front of the Royal Hotel in Hanford, where he resided. His wallet was examined and was found to contain in one compartment a crisp $10 bill and five $1 bills. Marlene's brother testified that the $10 bill was "very similar" in texture to a $10 bill taken from his dresser on the night of the crime, and that one of the $1 bills was also taken from the dresser. He further testified that a mug partially full of nickels had been emptied by the intruder; a snap purse in Hillery's pocket was found to contain, among other coins, ten nickels.

At the time of his arrest, Hillery was asked where he had been the night before. He answered that he had picked his girlfriend up at 8:30 p.m. and had spent the rest of the

night with her in his hotel room. The girlfriend, Allean Stallworth, likewise told the officers that respondent had picked her up at 8:30 p.m.

In subsequent statements to the police, and in his trial testimony, respondent told a different story. He stated that he left the Ferreira ranch at about 8:15 p.m. on March 21 and drove straight into town, following in his car behind that of Frank Costa, a fellow employee; that at about 8:40 p.m. he parked across the street from the Royal Cafe and Hotel; and that he then went up the hotel stairs to his room where he remained for a couple of hours, cleaning, and washing up. Each significant aspect of this story, however, was contradicted by other witnesses.

Frank Costa testified that although he drove away from the ranch with respondent's car behind him, he no longer saw

respondent's headlights after he had turned the corner of Elder and Tenth (i.e., the location of the Miller home); that he released his gas pedal for 10 to 15 seconds and looked back several times, but did not see Hillery following him. Rose Kendall, proprietress of the Royal Cafe, testified that it was her habit to observe the cars on the street near her establishment, that she did so between 8:30 p.m. and 10 p.m. on March 21, but did not see respondent's car parked on the street until about midnight. Mrs. Tom Sunoo, manageress of the Royal Hotel, testified that during the evening of March 21 she was seated as usual in her office in a chair facing the head of the hotel stairs, but at no time saw respondent come up those stairs tc his room.

With respect to the remainder of the evening, respondent admitted that at about 10 p.m. he entered a laundromat in

Hanford and placed his work clothes and his white leather jacket in a washing machine; that he telephone Mrs. Stallworth from that location at 10:10 p.m., and that he picked her up at her apartment at about 10:20 p.m. (rather than 8:30 p.m., as he had originally told the police). They bought some food at a drive-in restaurant, removed his clothes from the laundromat, left his leather jacket at Mrs. Stallworth's apartment, and spent the rest of the night in his hotel room. The next morning the police found respondent's leather jacket, still damp, hanging over a heater in Mrs. Stallworth's apartment.

Respondent explained the need for washing his clothes that evening by saying that he had been spattered with cow manure while doing the milking at the Ferreira ranch. But Frank Costa, who milked the cows with respondent, testified that there was no manure on respondent's clothes when he left

the ranch that evening. Mr. Ferreira testified that to his knowledge respondent never wore his white leather jacket while he did farm work, but would hang it in the supply room where he kept his boots and work clothes. Mrs. Stallworth testified that she did respondent's laundry during the months of January, February, and March of that year; that respondent gave her his clothes to wash on Thursday of the week preceding the crime, and that she returned them to him on March 21; that in the nine months she had been respondent's girlfriend she had never known him to take his own laundry to the laundromat and wash it himself, and that she had never known him to put his white leather jacket in a washing machine.

On cross-examination, respondent admitted that he had a prior felony conviction for forcible rape.

B. Facts Produced at Respondent's Original State Court Motion to Quash the Indictment

Respondent raised the issue of systematic exclusion of black persons from the grand jury which had indicted him in a pretrial motion to set aside the indictment pursuant to California Penal Code section 995 which was dated July 16, 1962 (CT 11, 23, 26; RT 15). Supporting and opposing affidavits were filed. An evidentiary hearing and arguments were held on July 16 and 31, 1962 (CT 28-41; RT 6, 15). All of the material from the state court record which relates to respondent's motion to quash was provided to the District Court in connection with the petition for federal habeas corpus relief.

In his direct appeal from the judgment of conviction, respondent challenged the trial court's ruling on his motion to quash. In affirming this conviction, the California Supreme Court made a series of

factual findings which petitioner now contends are binding on the federal courts pursuant to Sumner v. Mata (1981) 449 U.S. 539.

The California Supreme Court specifically found that:

> "Defendant [respondent] sought to prove that no Negro had served on a Kings County grand jury since 1893, the year in which the county was organized. The People did not dispute this fact, but introduced evidence based on official census records establishing that in 1960 Negroes constituted only 5.1 percent of the total population of Kings County, and that prior to World War II the proportion had been 1 percent or less. It was also shown that Negroes had often served on petit juries in Kings County (and defendant does not complain of the fact that there was no Negro on the jury that tried and convicted him). The county clerk testified that it was her duty to check the proposed grand jury list against the voters' registration affidavits to determine whether any persons therein named were disqualified by statute, but that such affidavits bear no indication as to the race of the voter; she further testified that during her tenure in office (since 1953) no

member of the board of supervisors or judge of the superior court had ever requested her to determine the race of a prospective grand juror.

"In the court of the hearing on the motion to quash, the trial judge spoke at length on the subject of his method of selecting grand juries since he took office in 1956, and subsequently ordered that such statements be considered as his testimony. He said that in selecting a panel he 'always endeavors on each one of those [judicial] districts to get a good cross section of people who will be qualified to serve as Grand Jurors'; that he had consistently 'tried to get a distribution of racial descents, tried to get both sexes represented, tried to get occupations, farmer [sic], business men and various other types so it will be real -- a real representative group of people, of the better type'; and that since 1956 he had not had a Negro on the panel 'not through lack of desire, but purely through lack of ability to find one that the Court feels would make a proper Grand Juror.' The judge pointed out that he had previously asked defendant's counsel to suggest the names of Negro residents who might be qualified to serve, and had considered selecting a Mr. Lloyd Welcher but declined to after determining that the duties would interfere with the latter's regular

> employment. Finally, it was shown that in Kings County 'rarely is any of the grant jury's time devoted to hearing evidence of criminal offenses,' and that in the decade evidence of criminal offenses,' and that in the decade ending in 1962 more than 1,000 prosecutions were initiated by information while four were initiated by indictment and only one of the later was against a Negro." (People v. Hillery, supra, 62 Cal.2d at pp. 709-710.)

Kings County was formed in 1893 and had only one superior court judge. Judge Meridith Wingrove took the bench in 1956, and was on the bench in 1962 when respondent was indicted.

From 1900 until 1962 either California Code of Civil Procedure (CCP) section 206, or California Penal Code (Pen. Code) section 899, required that the superior court apportion its grand jury selections according to the population of the county's four judicial districts.

Until 1915 the statutory qualifications for grand jury service

included a requirement of property ownership. (CCP § 198.)

Until 1972 it was a requirement for grand jury service that a person be 21 years of age. Until 1920 grand jury service was limited to males.

From 1915 until 1962 it was a requirement that a person be a resident of the state and county for one year before being eligible for grand jury service. (CCP § 198.) There were also disqualifications because of the conviction of a felony and because of a lack of United States citizenship. (Pen. Code, § 893.) To be eligible for grand jury service persons had to have sufficient knowledge of the English language and had to be of ordinary intelligence. (CCP § 198.) Persons serving on the grand jury were to be of fair character, approved integrity, and had to have sound judgment. (Pen. Code, § 897.)

Persons who had served on a grand jury during the previous year and those service on trial juries were also disqualified from grand jury service. (Pen. Code, § 893.)

There were also a number of statutory exemptions from grand and trial jury service which included ministers of the gospel, teachers, mail carriers, military personnel, and certain railroad employees. (CCP § 200.)

Grand jury service in California is for one year with only one grand jury being impaneled in the county each year. The grand jury in California performs both civil and criminal functions. In its role as a "watchdog" of county government, the grand jury investigates the various functions of county government and issues a comprehensive yearly report which details its findings and often included recommendations for changes. (See 20 U.C.L.A. L.Rev. 581 (1973).)

C. Facts Produced at the Federal Evidentiary Hearing

Over the State's strenuous objections, the District Court conducted an evidentiary hearing on April 28-29 of 1982. To accommodate two elderly witnesses who had hardships, the court allowed the testimony of these witnesses to be taken by deposition.

The evidentiary hearing conducted in this matter reaffirmed the State's earlier assertions that any attempt to try a 20-year-old factual dispute would be virtually impossible.

Three of the witnesses respondent called at the federal evidentiary hearing were older black people who had been long-time residents of Kings County. Each of these witnesses had previously submitted declarations under penalty of perjury attesting inter alia to the fact that they knew the qualifications for grand jury

service and knew there were black persons in Kings County who met these qualifications. However, when they testified in person each said they did not know the qualifications for grand jury service.

These witnesses testified that black people had served on the county's trial juries. There was also testimony that black people served on trial juries before respondent's 1962 indictment. Each witness acknowledged that prior to the late 1940's, the Kings County black population was extremely small. Before the second world war, blacks were generally involved in farm work and traveled throughout the county to get jobs. Prior to the late 1940's most of the black people in Kings County lived on farms spread throughout the county. After the postwar influx of blacks into the county, the urban population of blacks grew, primarily in the county's largest city, Hanford.

One of the attorneys in the firm representing respondent in the federal proceedings testified that he selected certain census data from each decennial census from 1900 through and including 1960 which he felt estimated the population of eligible blacks in Kings County.

For the critical two decades of 1960 and 1950, respondent's counsel had to again estimate the population of blacks over 21 years old in Kings County since "a breakdown of black males and black females age 21 and over was not available."

Respondent also presented the testimony of a forensic actuary, Mr. Parkyn, who performed a sophisticated computer analysis of the census data provided to him by respondent's counsel. Mr. Parkyn testified that, based on his computer analysis, there was very little probability that 62 all non-

black grand juries could have been selected in Kings County from 1900 until 1962.

Although means were available to do so, Mr. Parkyn did not interpolate each decennial census but instead used a constant figure for each of the ten years within the decade.

Most importantly, Mr. Parkyn testified that his analysis could not prove intent but merely proved probability. Furthermore, Mr. Parkyn testified that only 19 black persons would have served throughout the 62 years between 1900 and 1962 if the selection system had been perfectly random.

Based on this newly developed evidence, the District Court reversed a twenty-year-old first degree murder conviction supported by three separate jury verdicts.

- - - - - -

ARGUMENTS

I

INTRODUCTION

Respondent, a life-term inmate now confined at San Quentin State Prison, is proceeding in forma pauperis with appointed counsel. He has obtained a writ of habeas corpus pursuant to 28 United States Code section 2254. In his writ he successfully challenged the constitutionality of his 1962 Kings County Superior Court conviction for first degree murder (Pen. Code, § 187), on the grounds that he was denied equal protection of the laws because blacks were systematically excluded from the grand jury which indicted him.

On May 12, 1983, the District Court granted respondent Booker T. Hillery's petition for writ of habeas corpus and subsequently the State of California was ordered to file a new charging document

within ninety (90) days or release Mr. Hillery from custody.

Thus, twenty years after the denial of his original motion to quash the indictment which charged him with murder, respondent filed a habeas corpus petition in the federal courts which alleged that there had been purposeful discrimination against members of his race since no black person had been selected for or served on the Kings County Grand Jury from 1883 until 1962, when he was indicted for murder.

The District Court conducted an evidentiary hearing and after making several crucial factual and legal findings, respondent's 20-year-old murder conviction was reversed.

The District Court first found that the presumption of correctness created by 28 United States Code section 2254 did not apply to this case because:

(1) respondent supposedly had not received a full or fair hearing in the state court because the judge who heard his motion to quash was also the person who selected grand jurors, and because

(2) the California Supreme Court allegedly did not make any factual findings within the meaning of Sumner v. Mata, supra, 449 U.S. 539.

The district court then applied the prima facie case analysis set forth in Castenada v. Partida (1977) 430 U.S. 442 and found that:

(1) blacks comprised an identifiable, distinct and significant class in Kings County between 1956 and 1962;

(2) there was a possibility of abuse in the selection process; and

(3) that there was significant underrepresentation of the class.

To determine whether there was significant underrepresentation in this case, the District Court looked to: (a) the generally accepted standard deviation test; (b) probability theory; (c) and nonstatistical evidence.

In applying the standard deviation analysis, it is a well established rule that courts should be extremely cautious of drawing any adverse inferences from standard deviations in the range of 1 to 3. For the critical years between 1956 and 1962, the total standard deviation in the instant case is only 3.03. The district court nevertheless concluded that this standard deviation suggested that the absence of blacks from the Kings County Grand Jury panels for this six-year period was not due solely to chance or accident.

Turning to probability theory, the district court relied on the testimony of

Hillery's newly discovered expert witnesses to establish that the probability was approximately two-tenths of one percent that random selection would produce a non-black grand jury for the years 1956 to 1962. According to the district court, this expert theoretical evidence "would tend to establish an inference of intentional discrimination." These are the "facts" which led the district court to reverse respondent's twenty-year-old conviction.

It is petitioner's contention that there are other facts which have significance aside from the numbers of blacks who did not serve on the Kings County Grand Jury and that the District Court did not consider these additional relevant facts. Here, there is no assertion of respondent's factual innocence. Mr. Hillery does not claim that he did not brutally murder Marlene Miller. Three separate juries have heard the evidence in

this case and none of them have found that respondent deserved anything less than death for what he had done. Respondent does not claim that the evidence presented to the grand jury was insufficient to bind him over for trial. In fact, the attorney who represented respondent at trial admitted that there was no real doubt that respondent would have been bound over for trial had the indictment been quashed and had he received a preliminary hearing. Most importantly, there is no claim here that Mr. Hillery did not receive a fair trial or that blacks had been systematically excluded from trial juries in Kings County. In fact there is affirmative evidence to the contrary. Furthermore, there is no claim of continuing discrimination in this care. The situation is just the opposite since there is evidence which the district court all but ignored which

suggested that remedial measures had already begun before Mr. Hillery had been indicted.

When these facts are considered, it becomes clear that it is a substantial injustice to reverse Mr. Hillery's 20-year-old murder conviction without any showing that the exclusion of blacks from the grand jury affected the fairness of respondent's trial and in the absence of any assertion of innocence.

- - - - - -

II

IT WAS ERROR FOR THE DISTRICT COURT TO APPLY A RULE OF AUTOMATIC REVERSAL TO A CASE OF PURPOSEFUL DISCRIMINATION WHERE THERE IS OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT; WHERE THE DEFENDANT RECEIVED A FULL AND FAIR TRIAL; AND WHERE THERE IS NO INDICATION OF CONTINUING DISCRIMINATION

Petitioner contends that the time has come to extend the harmless error rule to cases of purposeful discrimination in grand jury selection where the defendant received a fair trial; where the evidence of his guilt is overwhelming; and where there is no continuing history of discrimination.

It is now a well established rule that a criminal defendant "is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." Alexander v. Louisiana (1972) 405 U.S. 625, 628-629.

This Court has enforced this rule since Strader v. West Virginia (1880) 100 U.S. 303.

Historically, those cases in which a conviction was reversed because of discriminatory grand jury selection also involved discrimination in the selection of trial juries. Neal v. Delaware (1880) 103 U.S. 370; see also Bush v. Kentucky (1882) 107 U.S. 110; Gibson v. Mississippi (1895) 162 U.S. 565; Hale v. Kentucky (1937) 303 U.S. 613.

However, this Court has also recognized in Chapman v. California (1967) 386 U.S. 18 and that all federal constitutional errors do not warrant automatic reversal of a state court conviction.

In an earlier dissent in Cassell v. Texas (1950) 339 U.S. 282, 298, Mr. Justice Jackson had argued that discrimination in the

selection of grand juries could be considered harmless error so long as it could be shown that the defendant received a fair trial.

In Rose v. Mitchell (1979) 443 U.S. 545 this Court attempted to resolve the issue of whether automatic reversal is required in all cases of purposeful discrimination or whether the harmless error test should be applied to such cases. Part II of the Court's opinion in Rose addressed this difficult question.

Rose involved a claim by four black males convicted of murder in a Tennessee state court that their equal protection rights had been violated because there had been purposeful discrimination against blacks in the selection of grand jury foreman.

The opinion of the court in Rose consisted of four parts with part I summarizing the facts of the case.

Part II of the Court's opinion in Rose preserved the draconian rule that where discrimination in violation of the Fourteenth Amendment is proved, the court will "quash the indictment . . . without regard to prejudice" 443 U.S. at 556. [3/]

In writing for the Court Mr. Justice Blackmun acknowledged that "there are costs associated with this approach" 443 U.S. at 557. Despite these costs, the Court in Rose relied heavily upon the possibility of re-trying the defendant as a justification for a rule of automatic reversal. The Court preserved the rigid rule of per se reversal because "we believe such costs as do exist are outweighed by the strong policy the Court consistently has recognized of combating

---

3. Parts III and IV of the opinion found that the Court of Appeal erred in finding that there had been purposeful discrimination.

racial discrimination in the administration of justice." Id. at 558.

The entire four part opinion of the Court was only endorsed by three justices (Blackmun, J., Brennan, J., and Marshall, J.).

Two justices (White, J. and Stevens, J.) joined in Part II but dissented from parts III and IV and also dissented from the judgment. Justice Stevens further qualified his support for Part II of the Court's Opinion by filing a separate opinion. In his separate opinion Justice Stevens indicated that had he been a member of the Court when Cassell v. Texas, supra, was decided, he would not necessarily have rejected the arguments set forth in Justice Jackson's dissent but that he felt compelled by stare decisis to join with Part II of the Court's opinion in Rose.

Justice Stewart filed a separate opinion which concurred in the judgment and which also argued that "a claim of discrimination in the selection of a grand jury or its foreman is not a ground for setting aside a valid criminal conviction" 443 U.S. at 579. Justice Rehnquist joined in the opinion of Justice Stewart. In a separate opinion, Justice Powell indicated that claim of discrimination in the selection of grand juries should not be cognizable in federal habeas corpus proceedings where the defendant has had a full and fair consideration of his federal claim in the state courts.

At least one federal court has indicated that Part II of the Rose opinion may not have any precedential value since:

> ". . . Part II of Justice Blackmun's opinion was joined by only two justices who joined in the judgment of the Court and by two dissenters (Justices White and

Stevens), leading Justice Powell to question its precedential value 'for not all of the four Members who join in support even the Court's judgment.' Rose v. Mitchell, supra, 443 U.S. at 582, n. 3, 99 S.Ct. at 3014, n. 3 (Powell, J., concurring). Since 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds,' Gregg v. Georgia, 428 U.S. 153, 169, n. 15, 96 S.Ct. 2909, 2923, n. 15, 49 L.Ed.2d 859 (1976), Justice Powell's point is well taken." (United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d at 1120.)

Rose was followed by the case of Connecticut v. Johnson (1983) 460 U.S. 73, 103 S.Ct. 969. In Johnson this Court again examined the doctrine of "harmless error" as it applies to state criminal prosecutions. In Johnson this Court cited its earlier opinion in Chapman v. California (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, with approval.

As indicated previously, Chapman had established the rule that "some constitutional errors may be considered harmless if the beneficiary of the error proves" beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

The Johnson court noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" Connecticut v. Johnson, supra, 103 S.Ct. at 975 (emphasis added).

This Court then went on to note in Johnson the instances where a violation of a criminal defendant's constitutional rights can not be considered to be harmless error. The cases cited included: Gideon v. Wainwright (1963) 372 U.S. 335 (right to counsel at trial); Payne v. Arkansas (1958) 356 U.S. 560 (coerced confession); Tumey v.

Ohio (1927) 273 U.S. 510 (impartial judge). Each case dealt with the fairness of the trial which the defendant had received.

Finally, in 1984 this Court decided the case of Hobby v. United States (1984) ____ U.S. ____; 104 S.Ct. 3093. In Hobby, the petitioner was a white male who had been indicted by a federal grand jury. In a pretrial motion, petitioner alleged that there was discrimination against women and blacks in the selection of grand jury foremen. Petitioner only asserted that his due process rights had been violated and did not allege an equal protection claim.

Petitioner argued that Rose v. Mitchell, supra, supported his claim that discrimination in the selection of grand jury foreman warranted reversal of his conviction.

This Court rejected the argument that Rose required an automatic reversal of the conviction in Hobby.

The instant case raises the issue of whether a 1962 state court murder conviction is subject to a rule of automatic reversal because blacks were systematically excluded from grand jury service more than twenty years ago, despite the fact that blacks had regularly served on trial juries, despite the overwhelming evidence against respondent and without any evidence that the discrimination is continuing.

The danger of a discriminatorily selected grand jury is that its evaluation of the evidence against a defendant may be biased, resulting in an unfounded charging document being filed against him. There is also a danger of an otherwise unnecessary public trial where, if the bias continues, a defendant may be wrongly convicted. However, where the only contention of impropriety in the entire process resulting in a defendant's conviction relates to the selection of the

grand jurors, the indictment is not necessarily erroneous, and most importantly, the integrity of the trial is unaffected. As in Fourth Amendment cases, the retrospective focus on the grand jury selection process distracts attention from the crucial inquiry of whether the defendant has had a fair and unbiased trial wherein an appropriately constituted trial jury has found him guilty beyond any reasonable doubt. (See Stone v. Powell (1976) 428 U.S. 465, 490.)

In the instant case the district court refused the State's motion to decide whether this particular error could be considered harmless for two reasons. First, the district court felt that application of a "per se reversible error standard" was necessary for deterrence purposes. Second, any application of the harmless error rule was rejected to protect the integrity of the judicial process.

Reversal of the District Court's order granting the writ of habeas corpus is necessary to correct what amounts to an exceptional legal error.

In the words of Justice Jackson, the right of every citizen to insist upon a fair, unbiased and non-discriminatory selection process for grand juries is "unquestionable and should be directly and uncompromisingly enforced" Cassell v. Texas, supra, 339 U.S. at 304.

However, enforcement of these rights does not require a rule of automatic reversal in all cases involving discriminatory grand jury selections.

In United States ex rel. Barksdale v. Blackburn, supra, 639 F.2d 1115, the Fifth Circuit recognized the distinct possibility that unless grand jury discrimination is accompanied by petit jury discrimination "such grand jury discrimination might be

harmless error." Similarly, in the recent case of Hobby v. United States, supra, this Court held that discrimination in the selection of federal grand jury foremen does not always require reversal of a conviction if the defendant has received an otherwise fair trial.

The record in the instant case contained undisputed facts which have significance aside from the numbers of blacks who did not serve on the Kings County Grand Jury. Here, there is no assertion of respondent's factual innocence. Respondent does not claim that he did not brutally murder Marlene Miller. Three separate juries, 36 citizens, have heard the evidence of respondent's guilt and none of them found that Mr. Hillery deserved anything less than death for what he had done. Furthermore, respondent does not claim that the evidence presented to the grand jury was insufficient

to bind him over for trial. In fact, the prominent black attorney who represented respondent at trial admitted that there was no question in his mind that respondent would have been bound over for trial had the indictment been quashed and had he received a preliminary hearing (RT 4/28/82 246). More importantly, there is no claim here that respondent did not receive a fair trial or that blacks had been systematically excluded from trial juries in Kings County. Additionally, there is no claim of continuing disc.imination in this case, and any deterrent purpose purportedly served by reversing this judgment is therefore meaningless. To the contrary, there is affirmative evidence which the District Court all but ignored which indicated that remedial measures to correct the exclusion of blacks from the grand jury had already been initiated <u>before</u> Hillery was indicted.

The charging process in California is also markedly different from that of Tennessee where all criminal prosecutions must begin with an indictment. (Rose v. Mitchell, supra, at p. 548, n. 1.) In California a vast majority of prosecutions are initiated by the complaint process which relies upon a preliminary hearing for a finding of probable cause to conduct a trial. See The Preliminary Hearings in Los Angeles, 18 U.C.L.A. Law Rev. 636, 678, n. 155 (1971). In 1962 the Kings County Grand Jury was even less involved in the charging process than the average California grand jury.

This distinction is important since one of the primary reasons expressed by Justice Blackmun for rejecting application of the harmless error rule to grand jury cases was his understanding of the role played by the indicting grand jury in Tennessee. See

Hobby v. United States, ____ U.S. ____, 104 S.Ct. 3093 (1984).

Realistically, the integrity of our judicial system is not threatened by the process Kings County used to select its grand jury more than twenty-five years ago. However, the reversal of three different jury verdicts each returned after a fair trial, all of which are supported by overwhelming evidence of respondent's guilt, does little to enhance the integrity of the judicial process.

When the totality of those facts are considered, it becomes inescapable that the People of the State of California have suffered a substantial injustice with the reversal of respondent's 20-year-old first degree murder conviction without any showing that the exclusion of blacks from the grand jury affected the fairness of respondent's

trial and in the absence of any assertion of respondent's innocence.

- - - - - -

III

RESPONDENT FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES SINCE HE SIGNIFICANTLY CHANGED THE EVIDENTIARY BASIS OF HIS CLAIM FOR RELIEF WITHOUT EVER PRESENTING THIS NEW EVIDENCE TO STATE COURTS

To support his claim of systematic exclusion of blacks from the Kings County grand jury, respondent relied primarily upon evidence which was never presented to any of the state courts which have previously been asked to review his claim for relief. In doing so, respondent violated 28 U.S.C. section 2254 which expressly requires exhaustion of available state remedies.

As previously noted, on November 10, 1981, the State filed a motion to dismiss the petition for failure to exhaust as to the newly discovered evidence (CR 36). The district court denied this motion. Hillery v. Pulley, supra, 533 F.Supp. 1189.

This issue was raised by petitioner on appeal and in his dissent in this case Circuit Judge Anderson concluded that:

> "Although petitioner's basic claim has remained the same, the evidentiary basis for that claim changed significantly in the present habeas corpus proceeding from that presented to the state courts years ago." (9th Cir. opinion, 5/14/84; attached as Appendix "B" to the petition for certiorari.)

The state has consistently acknowledged that there was exhaustion as to respondent's claim for relief which was based exclusively on the state court record. This fact remains true.

However, to the extent that respondent sought and obtained relief based on facts which were never presented to any state court, there was no exhaustion of state remedies as required by 28 United States Code section 2254.

Exhaustion of available state remedies is a jurisdictional prerequisite to obtaining federal habeas corpus relief.

It is petitioner's contention that in order to satisfy the express provisions of 28 United States Code section 2254(b) Mr. Hillery should have been required to take his additional evidence back to the state courts to give the state court's the opportunity to rule upon his claims for relief. (La Blanc v. Patterson (D.C. Colo. 1968) 294 F.Supp. 607; U.S. ex rel. Figueroa v. McMann (2nd Cir. 1969) 411 F.2d 915; U.S. ex rel. Galloway v. Fogg (D.C.N.Y. 1975) 403 F.Supp. 248; Camera v. Bombard (S.D.N.Y. 1978) 455 F.Supp. 176.)

Obviously, before a petitioner will be sent back to state court, the new factual material must be more than mere "bits of evidence" and must be the type of evidence which puts the case in a markedly different

posture from that considered at the state court trial. (Nelson v. Moore (2nd Cir. 1972) 470 F.2d 1192, cert. den. 412 U.S. 951.)

Here, both respondent and the district court relied upon a sophisticated computer analysis of statistical evidence to show that there was virtually no chance that the grand jury selection system in Kings County was random. This factual theory is far different from the case he presented to the state courts. Furthermore, respondent presented and relied upon the declarations and testimony of witnesses to establish the competency of black persons to serve as grand jurors in the 1960's and to establish their exclusion from the selection process. These witnesses were never presented to the state courts.

Here, there was a total failure of the exhaustion requirement as to this "new"

evidence and this case should have been dismissed without prejudice pending respondent's exhaustion of his state court remedies.

In opposition this exhaustion argument, petitioner asserted that he was not required to take his new evidence back to the state courts because a district court is empowered to take cognizance of this type of material by simply expanding the record in habeas corpus proceedings pursuant to Rule 7, 28 United States Code section 2254 foll.

Respondent does not dispute the ability of the district court to expand the record, where appropriate, in habeas corpus proceedings.

Neither can it be disputed, however, that a petitioner seeking habeas corpus relief is still under a statutory obligation to exhaust his available state remedies. (28 U.S.C. § 2254(b).)

The balance which must be struck between Rule 7 and section 2254(b) is a matter of degrees.

Whether a particular habeas corpus petitioner will be required to go back to the state courts or remain in the district court appears to depend upon the nature of the supplemental evidence.

When the evidence which was not presented to the state courts does not materially affect the nature of petitioner's case, Rule 7 can be used to expand the record without offendirg 28 United States Code section 2254(b). However, when the evidence which was not presented to the state court is materially different or presents the petitioner's case in a significantly different posture, there is ample authority which holds that the case must be sent back to the state courts.

In rejecting the state's argument on this issue, the majority ignored a substantial body of relevant and binding precedent.

For example, the case of Zicarelli v. Gray (3rd Cir. 1976) 543 F.2d 466 is directly on point and supports the state's position on this issue. (See also Zicarelli v. Dietz (3rd Cir. 1980) 633 F.2d 312, cert. den. 101 S.Ct. 868.)

In the remarkably similar case of Zicarelli v. Gray, supra, 543 F.2d 466, the court held that:

> "For a court to determine a claim that a defendant has not been tried by a jury reflecting a cross-section of the community where the crime was committed, it must be apprised not only of the legal contention, but also of the demographic data supporting the contention. Zicarelli did not make such a proffer to the trial court, nor did he state to the appellate courts that he was ready to present such information to the trial court if the cause was remanded for such purposes. Indeed, the first clear

reference to the demographic data was made in Zicarelli's brief that was filed in the federal court to support his petition for habeas corpus."

The court in Zicarelli v. Gray, supra, went on to dismiss the petitioner's cross-section claim and required the petitioner to exhaust this issue in the state courts. (See Zicarelli v. Dietz, supra, 633 F.2d 312, cert. den., 101 S.Ct. 868.)

This same rule applies in those cases where the habeas petitioner has presented some supporting facts to the state courts but has later asserted different and more compelling factual allegations to the federal courts. (See, e.g., Gurule v. Turner (10th Cir. 1972) 461 F.2d 1083, 1084.)

A rule requiring exhaustion has been endorsed by the Fifth Circuit Court of Appeals in Knoxson v. Estelle (5th Cir. 1978) 574 F.2d 1339. In Knoxson a state prisoner was denied habeas relief by the district

court. After oral argument and submission of the case to the district court, petitioner filed a post-submission brief which contained factual material which had never been presented to the state courts.

The Circuit Court of Appeals held that:

> "The post-submission brief does contain new factual allegations in support of Knoxson's legal plea. With regard to these new facts, we believe that the petitioner has failed to exhaust his state remedies. His petition must be dismissed from the federal court without prejudice to give the state court an opportunity to review these newly surfaced facts in the further proceedings that we expect Knoxson to pursue. See Picard v. Connor, 1971, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438; United States ex rel. Boodie v. Herold, 2 Cir. 1965, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 349 F.2d 372; Gurule v. Turner, 10 Cir. 1972, 461 F.2d 1083; Developments in the Law--Habeas Corpus, 73 Harv.L.Rev. 1038, 1069 (1970) ('. . . evidence . . . clearly crucial to the claim . . . should first be presented to the state if the exhaustion rule is to be an effective one')."

> "This Court believes that the interests of the state of Texas, the federal courts, and the petitioner are best balanced by allowing the state courts to consider this evidence. We therefore vacate the District Court's denial of habeas relief and remand to the District Court with directions to dismiss the suit without prejudice to Knoxson's right to refile the petition if he is dissatisfied with the outcome of any proceedings he brings in the state court." (Emphasis added; see also Paullett v. Howard (3rd Cir. 1980) 634 F.2d 117.)

More importantly, the majority opinion in the instant case appears to be in direct conflict with earlier precedent decided by 9th Circuit itself.

Thus, in Daniels v. Nelson (9th Cir. 1972) 453 F.2d 340, 342, the Court held that:

> "Thus the claim made before the California court and the claim now made can both be said to be that the confession was involuntary. However, the substance of the claim now made is quite different from the substance of the claim made before the California court. As we stated in

> Schiers '[i]t is now wholly transformed by other factual assertions of the petitioner into quite a different problem.' To sustain the present claim, Daniels would have to offer evidence that does not appear in the record made in the state courts, that is, evidence that the police officer promised to release his family if he confessed. Under these circumstances, we agree with the trial court that the question now presented as to the voluntariness of Daniels' confession should be first presented to the California Courts." (See also Schiers v. People of the State of California (9th Cir. 1964) 333 F.2d 173, 175-176.)

Mr. Hillery claims that "throughout the entire proceedings in state and federal court," he has "alleged systematic exclusion of blacks in the grand jury process in Kings County." (CR 37, p. 5.)

The State does not dispute this assertion. The problem with respondent's analysis is that it is far too shallow. While Mr. Hillery's basic claim has remained the same, the evidentiary basis of that claim

changed dramatically after it was filed in the federal court and after a lawyer hired a consulting actuary to apply sophisticated computer techniques to this case.

Instead of relying on the evidence introduced in the state court almost twenty years ago, respondent now relies upon what he claims is a sophisticated computer analysis of the statistical probability that blacks would not have served on the Kings County Grand Jury had the selection been random.

Respondent was also allowed to introduce census material not introduced at the state court trial as well as introducing the testimony of several purported witnesses who did not testify at the original motion to quash which was conducted more than twenty years ago.

Thus, while respondents generic claim has remained the same, the species of

his claim has been drastically mutated into a wholly different animal.

It is not necessary that there be an entirely new and different legal contention raised to justify sending a case back to the state courts under section 2254(b). It is sufficient if the new factual allegations are simply "more compelling." (Gurule, supra.) Where the new factual material "wholly transforms" the case of "materially changes" it, the matter must be returned to the state courts. Here, the district court erred in denying the state's motion to dismiss the petition without prejudice and the district court's order granting the writ must therefore be reversed.

- - - - - -

CONCLUSION

For the foregoing reasons, petitioner requests that the judgment of the district court granting respondent's application for a writ of habeas corpus be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

WILLIAM GEORGE PRAHL
Supervising Deputy
Attorney General

Attorneys for Petitioner

WGP:amg
5/17/85